Supreme Court, U.S.
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No. 99-1462

In The

Supreme Court of the United States

THE CITY OF FORT WORTH, TEXAS,

Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONER CITY OF FORT WORTH

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I. RESPONDENTS HAVE FAILED TO RECONCILE THE CONFLICTS BETWEEN THE FIFTH CIRCUIT'S DECISION AND OTHER OPINIONS CONSTRUING PROPRIETARY RIGHTS

In 1968, at the behest of the Civil Aeronautics Board ("CAB"), Fort Worth and Dallas contracted to sell billions of dollars in bonds to finance and construct DFW Airport, and to consolidate all scheduled passenger service at the new airport. Because the revenue derived from DFW Airport is the only source of funds to repay the bonds, Fort Worth based its economic future on contractual assurances that Love Field would not compete for scheduled passenger service. Fort Worth fulfilled its obligation by destroying its airport, Greater Southwest, to make way for DFW Airport.

Now, thirty years later, and with a billion dollars in bonds still outstanding, DOT has changed the rules, abrogated contracts, and cast aside CAB's determination that Dallas and Fort Worth should be served by a single airport. DOT justifies all this by presuming Congress intended to preempt all existing restrictions when it enacted the ADA in 1978 – ten years **after** Dallas and Fort Worth instituted the regional airport plan in the Concurrent Bond Ordinance.

To the contrary, Congress manifested its intent that the ADA not interfere with the longstanding rights of local airport proprietors – like Dallas and Fort Worth – to regulate the level of service at their airports. Congress carefully prefaced the preemption provision with the qualifying phrase "[e]xcept as provided in this subsection," 49 U.S.C. § 41713(b)(1). In the same subsection, Congress again emphasized that the preemption provision "does not limit" local governments from "carrying out" their proprietary powers and rights. 49 U.S.C. § 41713(b)(3). Congress expressed its desire to encourage "air transportation at major urban areas through secondary or satellite airports *if* consistent with regional airport

plans of regional and local authorities. . . . " 49 U.S.C. § 40101(a)(8) (emphasis added).

This deference for local airport authority is also reflected in the ADA's legislative history. Congressman Anderson, floor manager of the ADA in the House, admonished: "It was not the intent of the House Conferees to limit in any way the normal exercise of a proprietor's powers to determine the level and nature of service to be provided at airports, subject to constitutional and statutory limitations. . . . "[1] 124 CONG. REC. 38,526 (1978) (House debate). During a specific discussion of the cities' Concurrent Bond Ordinance, Congressman Anderson again cautioned that the ADA should not be interpreted to conflict with the agreement:

> [Congressman Wright]: As I understand it, the 1968 Regional Airport Concurrent Bond Ordinance of the two Cities specifically contains a regional airport plan which absolutely precludes the use of Love Field or Meacham Field for interstate or foreign flights. I am insistent that this decision shall be respected and that nothing be done to place it in jeopardy.
>
> Now, if the CAB were to be allowed nevertheless to certificate any service into Love Field, let us say, then there would be a very serious concern that it could become a major air carrier airport once again, and that service would be drawn away from the Dallas-Fort Worth Airport into which all the cities' moneys and their futures have been pledged, to the serious inconvenience of Fort Worth passengers and also to the serious financial detriment of the cities of Dallas and Fort Worth and their ability to pay

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[1] As a Manager for the House, Mr. Anderson's remarks about the ADA are entitled to substantial weight. *See Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 14-16 (1976).

> off the Dallas-Fort Worth Airport bonds. I want to leave no possibility that any future administration or board member could misconstrue any language in this bill as encouraging or permitting such a travesty.
>
> I should like to ask the manager of the bill, the gentleman from California (Mr. Anderson): Am I correct in understanding that if the Dallas-Fort Worth Regional Airport Board or the cities inform the CAB that any interstate service to Love Field is not in accordance with the plan of the 1968 [Bond] Ordinance, and that they do not desire it, then the CAB could not certificate any such service to Love Field or to Meacham Field?
>
> * * *
>
> Mr. Anderson of California. Mr. Chairman, my understanding of the language is as the gentleman stated it.

124 CONG. REC. 30,670 (1978).

Disregarding congressional intent, Respondents argue the Love Field perimeter rule cannot be enforced because proprietary powers may only be used to regulate matters such as noise. DOT goes so far as to declare that "no court has ever held or suggested that one airport may adopt a perimeter rule to protect a different airport from competition." [DOT 10][2]

Respondents cannot reconcile their views on proprietary rights, or the Fifth Circuit's opinion, with earlier decisions interpreting the ADA. In *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*, the court refuted the notion that airport owners may use proprietary powers only to deal with environmental matters such as noise. 658 F. Supp. 952, 956-57 (S.D.N.Y. 1986),

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[2] "DOT ___" refers to the Department of Transportation's Opposition Brief. "FW ___", "FW App ___", and "AA App ___" refer to Fort Worth's Petition, Fort Worth's Appendix, and American's Appendix.

aff'd, 817 F.2d 222 (2d Cir. 1987). The court concluded that a perimeter rule could be imposed "to reduce ground congestion ***and maintain LaGuardia as a short and medium haul airport by diverting longer haul air traffic to Kennedy and Newark.***"[3] *Id.* at 953 (emphasis added).

Likewise, the stated purposes of the perimeter rule upheld in *City of Houston v. FAA* were "(1) ***to assure the full utilization of Dulles; [and] (2) to preserve the short- and medium-haul nature of National.*** . . . " 679 F.2d 1184, 1188 (5th Cir. 1982) (emphasis added). And while Respondents suggest *City of Houston* would have been decided differently had the perimeter rule been imposed by a local proprietor (and not the FAA), the FAA advised the Fifth Circuit otherwise in its brief:

> Houston is simply incorrect in suggesting that any other airport proprietor could not, under the [proprietor exemption], impose operating restrictions of this type.
>
> * * *
>
> [T]he Government's position in this case in no way differs from its long-held view that an airport proprietor may discriminate between types, kinds and classes of aeronautical usage when the proprietor operates more than one airport and seeks merely to differentiate between types of air service at the different airports.

Response of the FAA in *City of Houston v. FAA*, No. 80-2030 at 23-25 n.28 (5th Cir., filed May 26, 1981).

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[3] Respondents allege the Second Circuit retreated from *Western Air Lines* in *National Helicopter Corp. of America v. City of New York*, where the court held that a local regulation could not define the precise route a helicopter may fly over the city. 137 F.3d 81 (2d Cir. 1998). At the same time, the court recognized the city's proprietary right to control the size of its heliport by upholding a regulation designed to reduce the number of operations at Manhattan Airport. *Id.* at 90-91.

Equally unpersuasive are efforts to distinguish *Arapahoe County v. Centennial Express Airlines*, 956 P.2d 587 (Colo. 1998). DOT first argues the opinion does not conflict with the lower court's decision, though the Fifth Circuit itself acknowledged the conflict. [FW App 36 ("[W]e view that case as deviating from the generally accepted rule we adopt here.")] DOT then suggests the state court's interpretation of proprietary rights "was not essential to the court's holding." [DOT 23] But DOT cannot escape the court's ultimate determination: an airport proprietor may restrict scheduled passenger service at one airport to prevent competition with a nearby regional airport.

There are unmistakable conflicts between the Fifth Circuit's decision and the opinions in *Western Air Lines*, *Arapahoe County*, and *City of Houston*. The need for this Court to review and resolve the conflict is best evidenced by the diverging views of proprietary rights in the ten briefs submitted thus far.

II. DOT HAS FAILED TO RECONCILE ITS OWN CONFLICTS REGARDING PROPRIETARY RIGHTS

Perhaps the most troubling aspect of this case is the absolute inconsistency of DOT itself. With respect to all other airports, like those in West Virginia and Austin [FW 16-17], DOT has steadfastly acknowledged that the public interest suffers when scheduled passenger service is fragmented between nearby competing airports, and that local authorities may implement rules to prevent competition. DOT fails to explain why Love Field and DFW Airport, which are separated by twelve miles, should be regarded differently. DOT states only that it "has determined that competition between the two airports in the Dallas-Fort Worth area serves the public interest and does not significantly harm DFW Airport." [DOT 22 n.17]

Remarkably, DOT has conducted no hearings, undertaken no studies, and hired no experts to support its view

that there will be no adverse effects on DFW Airport or the citizens of Dallas and Fort Worth. In contrast, it took CAB several years of extensive studies and public hearings to determine that neither Love Field nor Greater Southwest could accommodate the future commercial air traffic in Dallas-Fort Worth [AA App 172A], and that "the public convenience and necessity require . . . that Dallas and Fort Worth be served through a single airport." [AA App 170A]

DOT would disregard CAB's findings, as well as the contracts that provide the financial underpinning of DFW Airport, on the bare premise that the ADA was intended to encourage competition.[4] The quest for greater competition, however, does not justify a groundless interpretation of the ADA, the effect of which would be to discourage, if not eliminate, regional planning. The policy of the ADA is to encourage competition among *airlines*, not *airports*. Competition is favored "only to the extent that it complements and aids the overall policy of the [ADA], ***which is to develop a sound air transportation system.***" *Big Bear Cartage, Inc. v. Air Cargo, Inc.*, 419 F. Supp. 982, 986 (N.D. Ill. 1976) (emphasis added).

If allowed to stand, the Fifth Circuit's decision will greatly expand ADA preemption. The underlying DOT order provides that the perimeter rule may be upheld only if essential to DFW Airport's "viability." [FW App 111-113] Although DOT claimed its decision was based on "existing case law," [FW App 91-92], this extraordinarily high burden has never been articulated as the standard by which airport proprietors may implement regulations. The Colorado Supreme Court and the Second Circuit imposed no such constraints in determining that local airport proprietors may consolidate long-haul

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[4] Legend and Southwest, if really serious about competition, could offer service at DFW Airport like all other airlines rather than seeking a federally-protected niche at Love Field.

scheduled passenger service at one airport and maintain other airports as short-haul and general aviation facilities.

In addition to contradicting settled case law, DOT's interpretation of the ADA defies common sense. DOT argues that Dallas and Fort Worth did not prove that the restrictions at Love Field are "currently needed."[5] [DOT 19 n.16] Under this reasoning, airport proprietors bear the burden – presumably forever – of reestablishing the necessity of a restriction each time a new carrier seeks to offer unrestricted service. There is no authority to suggest that an airport operator, having previously studied noise, congestion, and safety, and entered into long-term financial commitments, must continually prove the need for its regional plan. *Compare Western Airlines*, 658 F. Supp. at 960 (testing validity of perimeter rule at time rule was imposed).

Further, there can be no serious dispute that large volumes of traffic will be diverted from DFW Airport to Love Field, along with substantial revenue needed to retire the bonds sold to build DFW. The flurry of activity at Love Field caused by the Fifth Circuit's decision has been well-chronicled. *See, e.g.*, Dallas Morning News, May 2, 2000, at 1D; Dallas Morning News, May 27, 2000, at 1A. Legend is nearing completion of its new terminal and has already instituted long-haul service to both

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[5] Although the Fifth Circuit concluded DOT complied with "the minimum procedural notice requirements," [FW App 12], DOT provided no notice that the proponents of the perimeter rule would be required to submit evidence supporting the rule, and certainly gave no hint that those parties must establish a threat to DFW Airport's "viability." DOT styled its action as an "interpretation" proceeding and announced it would rule on "straightforward statutory interpretation issues." DOT denied requests for oral argument, denied a request for an environmental impact study, and denied a request for abatement pending an analysis of air traffic congestion in the Dallas-Fort Worth area.

coasts; American has remodeled three gates and begun its own interstate service; Continental has started limited interstate service and is offering through-ticket service to much of the world through its Houston hub; and Delta and Comair have announced plans to offer interstate service in the near future. The threat posed by Love Field is best evidenced by Delta's recent quote on the front page of the May 27 edition of the Dallas Morning News: **"Love Field certainly provides an attractive alternative to DFW Airport."**

III. THE PROPRIETARY RIGHTS PROVISION OF THE ADA APPLIES TO THE FLIGHTS PERMITTED BY THE WRIGHT AND SHELBY AMENDMENTS

Respondents also attempt to manufacture preemption under the Wright and Shelby Amendments, which merely permit DOT to certificate certain flights at Love Field. Nothing in the text of the Wright or Shelby Amendments, however, addresses preemption or proprietary rights. The only statement regarding either comes from the conference report accompanying the Wright Amendment, wherein Congress expressly declared that the proprietary rights provision of the ADA applies to Love Field:

> [T]he preemption and proprietary rights provisions of [the ADA] apply to the authority to serve Love Field on interstate flights authorized by the amendment.

H.R. CONF. REP. No. 96-716 at 26 (1979), *reprinted in* 1980 U.S.C.C.A.N. 78, 88.

Congress could not have intended to impliedly preempt the cities' proprietary powers if it specifically provided that those powers be preserved. Indeed, the purpose of the Wright Amendment was not to mandate flights at Love Field, but to prevent CAB/DOT from certificating flights inconsistent with the cities' regional airport plan. The Wright Amendment provides a general

prohibition on certification, then sets forth several exceptions where certification would be *permissible*. Likewise, the Shelby Amendment merely redefined the "commuter airline" exception of the Wright Amendment to allow certification of aircraft reconfigured to have fifty-six seats or less.

To be sure, DOT certification conveys no affirmative rights. In fact, the ADA's reservation of proprietary powers expressly contemplates that such powers will be exercised with respect to ***"an air carrier holding a certificate issued by the Secretary of Transportation."*** 49 U.S.C. § 41713(b)(3) (emphasis added). At LaGuardia Airport, for example, certificated air carriers must comply with the perimeter rule enacted by the Port Authority and upheld by the Second Circuit in *Western Air Lines*. 817 F.2d 222 (2d Cir. 1987).

IV. THERE IS A CONFLICT AMONG FEDERAL COURTS REGARDING THE APPLICABILITY OF 28 U.S.C. § 1738 TO ADMINISTRATIVE AGENCIES

As Fort Worth noted in its petition, there is disagreement among federal courts regarding the applicability of the full faith and credit statute, 28 U.S.C. § 1738, to administrative agencies. [FW 22-26]. Tacitly acknowledging the conflict, the Fifth Circuit decided the "better rule" was that section 1738 should not apply to administrative agencies. [FW App 17-18 n.6] Fort Worth believes this issue of first impression merits review by the Court.

The importance of this question remains unchanged even though the state court of appeals, by a divided panel (with a written dissent), reversed the trial court and held that it must defer to DOT's construction of the ADA.[6] Although the state court action is nearing resolution, it is not over. Fort Worth has requested *en banc*

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[6] The dissent concluded the Concurrent Bond Ordinance was enforceable, and recognized that the cities' ability to repay

review of the majority panel's decision, and an appeal to the Supreme Court of Texas is still upcoming. But regardless of how the state court action concludes, it was wrong for DOT to attempt to usurp the authority of the state courts by injecting itself into this dispute, and by ignoring the state court's prior judgment.

Though DOT alleges its actions were justified because of "important national interests," DOT waited almost one year after the state court lawsuit was filed before initiating its proceeding. As the Fifth Circuit noted: "These key federal interests are arguably lessened by the fact that DOT did not attempt to stay or intervene in the state court action; presumably, if the federal interests were that important, DOT would have taken one of these actions." [FW App 22 n.8]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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DFW Airport bonds will be affected by the diversion of revenue from DFW to Love Field. *Legend Airlines, Inc., et al. v. City of Fort Worth, et al.*, No. 2-99-098-CV, 2000 WL 679,286 (Tex.App. – Fort Worth 2000) (Dauphinot, J., dissenting).